No. 06-272

Supreme Court, U.S.
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In The

Supreme Court of the United States

SYLVIA VAUGHN, as Administratrix of the Estate of Anthony Ryan McLemore,

Petitioner,

vs.

THE CITY OF ATHENS, ALABAMA, WAYNE HARPER, TRACY HARRISON, and TREVOR HARRIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE "SPECIAL RELATIONSHIP" AND "STATE CREATED DANGER" DOCTRINES WERE SUPERCEDED BY *COLLINS V. CITY OF HARKER HEIGHTS*, 503 U.S. 115 (1992)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
A. Nature of Case	2
B. Facts	2
C. Proceedings and Disposition Below	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Butera v. District of Columbia, 235 F.3d 637 (D.C. Cir. 2001) 6, 12

C.B. v. Bobo, 659 So.2d 98 (Ala. 1995) 12

Collins v. City of Harker Heights, 503 U.S. 115 (1992) ..... *passim*

Cornelius v. Town of Highland Lake, 880 F.2d 348 (11th Cir. 1989) 6, 7, 10, 11, 12

County of Sacramento v. Lewis, 523 U.S. 833 (1998) ..... *passim*

Davis v. Brady, 143 F.3d 1021 (6th Cir. 1998) 6, 12, 13

DeShaney v. Winnebago County Dep't of Soc. Servs., 109 S. Ct. 998 (1989) 5, 6, 12

Dwares v. City of New York, 985 F.2d 94 (2d Cir. 1993) 12

Ex parte Alabama Department of Youth Services, 880 So.2d 393 (Ala. 2003) 12

Farmer v. Brennan, 511 U.S. 825 (1994) 5, 6

Frances-Colon v. Ramirez, 107 F.3d 62 (1st Cir. 1997) 12

Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) 13

G-69 v. Degnan, 745 F.Supp. 254 (D.N.J. 1990) 6

Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992) 13

Johnson v. Dallas Indep. Sch. Distr., 38 F.3d 198 (5th Cir. 1994) 13

TABLE OF AUTHORITIES – Continued

Page

Jones v. Union County, 296 F.3d 417 (6th Cir. 2002) 13

Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) 13

Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996) 6, 12

McClendon v. City of Columbia, 305 F.3d 314 (5th Cir. 2002) 5, 8, 12, 13

Nicini v. Morra, 212 F.3d 798 (3d Cir. 2000) 6

Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995) 12

Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993) 13

Rivera v. Rhode Island, 402 F.3d 27 (1st Cir. 2005) 12

Ruiz v. McDonnell, 229 F.3d 1173 (10th Cir. 2002) 6, 13

Uhlrig v. Harder, 64 F.3d 567 (10th Cir. 1995) 13

Waddell v. Hendry County Sheriff's Office, 329 F.3d 1300 (11th Cir. 2003) 4

White v. Lemacks, 183 F.3d 1253 (11th Cir. 1999) .....*passim*

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) 13

Wright v. Bailey, 611 So.2d 300 (Ala. 1992) 12

STATUTES

28 U.S.C. § 1254(1) 1

42 U.S.C. § 1983 .....*passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is not reported. (App. 1). The court denied Sylvia Vaughn's petition for rehearing and petition for rehearing en banc; this order is not reported. (App. 1).

STATEMENT OF JURISDICTION

On July 12, 2006, the Eleventh Circuit denied Sylvia Vaughn's petition for rehearing and petition for rehearing en banc. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the

United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in action of law, suit in equity, or other property proceeding for redress.

STATEMENT OF THE CASE

A. Nature of Case

Sylvia Vaughn contends that the Defendants owed a duty to protect her son, Anthony McLemore, because of his "special relationship" with the Defendants – he effectively was in custody when murdered – and because the Defendants created the danger to which Anthony McLemore was exposed. However, the Eleventh Circuit maintains that the "special relationship" and "state created danger" doctrines no longer are valid for 42 U.S.C. § 1983 causes of action.

B. Facts

On August 18, 2002, Trevor Harris arrested Anthony McLemore, and placed him in the city jail for possession of a controlled substance, a felony. Athens Police Officers Harris and Harrison worked out a deal with Anthony where he agreed to cooperate by setting up a drug dealer, John Brown. However, Harris and Harrison had no legal authority to release Anthony to set up the drug buy because (1) only a judicial officer, not police officers, may release an arrestee on his own recognizance, (2) Anthony was on probation at the time of his arrest and not eligible for judicial bail, (3) Anthony's parole officer had placed a hold on him for violating parole, and (4) only prosecutors

have the authority to enter into agreements with arrestees. (See complaint at R1. 1).

Nevertheless, Harris and Harrison released Anthony to set up a buy from Brown. Standard protocol is to search the informant and then wire him. The informant is followed to within a few blocks of the deal and the transaction is listened to in case something goes bad. Before the officers sent Anthony, they were warned that Brown would kill Anthony for trying to set him up for criminal prosecution. These officers ignored the warnings and sent Anthony anyway. As the officers were warned, Brown killed Anthony on August 20, 2002, for trying to set him up.

The defendants claim that this was a normal drug buy that went bad. In reality, Harrison and Harris knew that if Anthony made the drug buy that he would be killed. They illegally released Anthony from the jail. Instead of taking any steps to provide for his safety, they ignored the threat and sent Anthony into harm's way. They did not even tell him about the threat. They then intentionally sent him to his death. There is a direct causal connection between the injury suffered and the affirmative conduct. But for the defendants' conduct, Anthony would still be alive today. Hence, this is a classic definition of deliberate indifference to a substantial risk of serious harm. Finally, this breach of duty is shocking to the conscience because the officers had the time and ability to prevent the harm but chose to do nothing. They also chose not to tell Anthony that his life was in danger.

C. Proceedings and Disposition Below

This action was filed on Nov. 13, 2003. (R1. 1). Athens, Harper, Harrison, and Harris filed motions to dismiss on

Dec. 3, 2003. (R1. 9,11,13). Brown filed a motion to dismiss on Jan. 5, 2004. (R1. 18). On May 19, 2005, the court dismissed all pertinent causes of action. (R1. 31,33,35,37). On April 20, 2006, the Eleventh Circuit Court of Appeals affirmed the district court. On July 12, 2006, the Eleventh Circuit denied the petitions for rehearing and rehearing en banc.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. In addition, the Eleventh Circuit's decision is in conflict with the other circuit courts and the Alabama Supreme Court.

Sylvia Vaughn contends that the Defendants owed a duty to protect her son, Anthony McLemore, because of his "special relationship" with the Defendants – he effectively was in custody when murdered – and because the Defendants created the danger to which Anthony McLemore was exposed. However, the Eleventh Circuit maintains that the "special relationship" and "state created danger" doctrines are no longer valid 42 U.S.C. § 1983 causes of action. See *Waddell v. Hendry County Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003) and *White v. Lemacks*, 183 F.3d 1253, 1257-1259 (11th Cir. 1999). The Eleventh Circuit is under the mistaken belief that these doctrines were superceded by the Supreme Court in *Collins v. City of Harker Heights*, 503 U.S. 115 (1992).

As a general matter, a State's failure to protect an individual from private violence, even in the face of an unknown danger, "does not constitute a violation of the

Due Process Clause." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 109 S.Ct. 998 (1989). Moreover, there is no 42 U.S.C. § 1983 substantive due process liability unless the state official's actions shock the conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 847-849 (1998). That is so whether or not the individual is in custody. *Lewis*, 523 U.S. at 849-850 (explaining "the point of conscience shocking is reached" by deliberate indifference to the medical needs of individuals *in state custody* and is necessary for a substantive due process violation in that situation). The custody determination is important, though, because the official's actions are more likely to shock the conscience if the official had a duty to protect the individual. *Lewis*, 523 U.S at 852.

There are several situations in which states have a duty to protect individuals from harm. First, under the Eighth Amendment, "prison officials have a duty to protect prisoners from violence at the hands of other prisoners." *Farmer v. Brennan*, 511 U.S. 825, 833 (1994).

Second, a state official has a Fourteenth Amendment duty to protect pretrial detainees from violence at the hands of other prisoners. See *Lewis*, 523 U.S. at 848.

Third, in any situation "[w]hen the state, through the affirmative exercise of its powers, acts to restrain an individual's freedom to act on his own behalf 'through incarceration, institutionalization, or other similar restraint of personal liberty,' the state creates a 'special relationship' between the individual and the state which imposes upon the state a constitutional duty to protect that individual from dangers, including, in certain circumstances, private violence." See, e.g., *McClendon v. City of Columbia*, 305 F.3d 314, 324 (5th Cir. 2002); *DeShaney v.*

Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989); *Ruiz v. McDonnell*, 299 F.3d 1173, 1182 (10th Cir. 2002); and *G-69 v. Degnan*, 745 F.Supp. 254 (D.N.J. 1990) (**undercover witnesses**).

Fourth, states have a duty to protect individuals from harm by third parties if the state played an affirmative role in creating the danger. See, e.g., *Butera v. District of Columbia*, 235 F.3d 637, 648-651 (D.C. Cir. 2001); *DeShaney*, 489 U.S. at 200-201; *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998) and *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996).

Because of the duty, deliberate indifference to harm faced by an individual in one of these situations will shock the conscience. See, e.g., *Davis*, 143 F.3d at 1026; *Butera*, 235 F.3d at 651; *Nicini v. Morra*, 212 F.3d 798, 810-811 (3d Cir. 2000); and *Brennan*, 511 U.S. at 834.

Until 1999, the Eleventh Circuit followed *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) and held that the "special relationship" and "state created danger" doctrines were valid 42 U.S.C. § 1983 causes of action. See *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989). However, in *White v. Lemacks*, 183 F.3d 1253, 1257-1259 (11th Cir. 1999), the Eleventh Circuit overruled *Cornelius* because the panel thought that *Collins v. City of Harker Heights*, 503 U.S. 115 (1992) was in conflict with *Cornelius*.

According to *White*, *Collins* held "that where non-custodial relationships are involved, the government can be held liable under substantive due process only where an official's act or omission is 'arbitrary or conscious shocking.'" *White*, 183 F.3d at 1257. *White* also stated that "[a]fter *Collins*, it appears the only relationship that

automatically gives rise to a government duty to protect individuals from harm by third parties under the substantive due process clause are custodial." *Id.* at 1257. White then concluded, "the part of *Cornelius* adopting, or perpetuating, a 'special relationship' doctrine that guarantees government employees constitutional protection from unreasonable risks of harm in the workplace is no longer good law." *Id.* at 1258. Finally, the court held that because *Collins* mandated a shock the conscience standard, the "special danger" doctrine no longer applied. *Id.* at 1259.

White erred in its reading of *Collins* and in its reading of *Cornelius*. Not surprisingly, then, it also erred in its conclusions. First, the court misunderstood *Collins*. In *Collins*, "an employee in the sanitation department of the City of Harker Heights, Texas, died of asphyxia after entering a manhole to unstop a sewer line." *Collins*, 503 U.S. at 117. The employee's widow sued the city under § 1983, arguing that the city had breached its constitutional duty to provide a safe working environment. *Id.* at 117-118. The decisive issue was whether the constitution imposed a duty on the city to provide a safe working environment. *Id.* at 125-126. The Court quickly said no. *Id.* at 130. The Court recognized that in some cases municipalities would have a duty to protect employees from harm, but those circumstances were not present in *Collins*. *Id.* at 125-127.

So did *Collins* hold, as *White* thought, "that where non-custodial relationships are involved, the government can be held liable under substantive due process only where an official's act or omission is 'arbitrary or conscious shocking?'" If that was what *Collins* held, *Lewis*, 523 U.S. at 847, would have overruled it. *Lewis* makes clear that the conscious shock standard applies to *any* type of substantive

due process violation, *including* custodial relationships. See *Lewis*, 523 U.S. at 849-850 ("the point of conscience shocking is reached" by deliberate indifference to the medical needs of individuals *in state custody* and is necessary for a substantive due process violation in that situation) and *McClendon*, 305 F.3d at 325-326.

Contrary to White, no state official is liable for a substantive due process violation unless his conduct shocks the conscience. That the result might end up being different depending on whether the plaintiff was in custody or at liberty is not because only the non-detained plaintiff must prove conscious shock, it is because the non-detained plaintiff has to prove a higher degree of fault by the official: Intent. Where the state has a duty to protect, as in a custody situation, deliberate indifference will shock the conscience. *Lewis*, 523 U.S. 833, at 849. Where there is no duty to protect, conscious shock requires intentional conduct. *Id.*

In any event, *Collins* did not create the rule attributed to it by *White*. *Collins* only held that states have no *general* duty to provide a safe work environment. *Collins* made very clear the limited nature of its holding:

> Petitioner does not claim that the city or any of its agents deliberately harmed her husband. In fact, she does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured. Instead, she makes the more general allegation that the city deprived him of life and liberty by failing to provide a safe work environment.

Collins, 503 U.S. at 125-127. What would be the result in these two more specific situations? *Collins* does not say,

because it analyzed and rejected *only the last claim*. *Collins* has nothing to say about any other situations, other than using them to point out the radical nature of the petitioner's claim.

Thus, *White*'s rule that "where non-c stodial relationships are involved, the government can be held liable under substantive due process only where an official's act or omission is arbitrary or conscious shocking" is that panel's own creation. *Collins* said no such thing, and *Lewis* teaches otherwise.

White also stated "after *Collins*, it *appears* the only relationship that automatically gives rise to a government duty to protect individuals from harm by third parties under the substantive due process clause are custodial." That also is incorrect. The only question in *Collins* was whether or not the state had a general duty to provide a safe working environment. The Court expressly distinguished cases where the state takes some action that increases the danger: "Petitioner . . . does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured." *Collins*, 503 U.S. at 125-126. The Court also expressly distinguished cases where the state has acted to restrain the individual's ability to act on her own: "Petitioner's submission . . . is quite different from the constitutional claim advanced by plaintiffs in several of our prior cases who argued that the State owes a duty to take care of those who have already been deprived of their liberty." *Id.* at 127. In sum, *Collins* itself distinguishes both the special relationship rule and the state created danger rule.

In *Cornelius*, city officials reached an agreement with officials of the local county jail in which the jail would provide inmates for day labor at, among other places, the city hall. *Cornelius*, 880 F.2d at 349. The inmates were supposed to be non-violent offenders. *Id.* at 350. After the work began, two of the inmates kidnapped and terrorized a city employee from her office over a period of several days. The employee sued the officials under § 1983 for a deprivation of her substantive due process rights, arguing that the officials brought the inmates to the city hall, knew some of the inmates were violent, and did nothing to protect the employees.

The court made no findings about whether the officials breached their duty, or if they did, whether or not the breach shocked the conscience. The only issue confronted and resolved by *Cornelius* was the existence, *vel non*, of a duty. See *Cornelius*, 880 F.2d at 352, 359. Recognizing that in general "the due process clause of the Constitution does not protect a member of the public at large from the criminal acts of a third person, even if the state was remiss in allowing the third person to be in a position in which he might cause harm to a member of the public" the court nevertheless held that under these facts, the officials had a duty to protect the employee because they exercised an extraordinary degree of control of the employee and because the officials created the dangerous situation. *Id.* at 352-359.

Granted, under *Collins*, any rule that had created a duty to protect based solely on the employment relationship would no longer be good law. However, contrary to *White*'s conclusion, no part of *Cornelius* created or used such a rule. *Cornelius*' finding of a special relationship was not based on the employment decision alone: "As town

Clerk, Mrs. Cornelius was required to submit to . . . conditions *well beyond* the normal restrictive control inherent in an employer-employee relationship to which an employee agrees." *Cornelius*, 880 F.2d at 355. It was the extraordinary control which created the duty, not the employment relationship itself.

Collins, of course, did not discuss extraordinary control, instead restricting its analysis to 'the normal restrictive control inherent in an employer-employee relationship.' In fact, Collins highlighted the fact that the petitioner made no attempt to prove that the employer exercised extraordinary control. *Collins*, 503 U.S. at 127. Thus, *Cornelius*' rule for extraordinary employment situations does not conflict with *Collins*' rule for normal employment situations, but fits the exceptions mentioned by *Collins*.

Finally, *White* misread *Cornelius* as saying that the "special danger" rule provided in and of itself for a substantive due process violation. *Id.* at 1255, 1258. The court held that because *Collins* mandated a shock the conscience standard, the "special danger" doctrine no longer applied. *Id.* at 1259. But the "special danger" doctrine is not an exception to the shock the conscience standard; it is an exception to the general rule that states have no duty to protect individuals from third parties. *White* confused the standards for the existence of a duty with the standards for liability when the duty is breached. The "special relationship" standard and the "special danger" standard are exceptions to the general rule that a state has no duty to protect an individual from harm by third parties. Conscious shocking is the standard for determining liability when the actor has breached the duty to protect. The two are different concepts. See, e.g., *Lewis*, 523 U.S. at

847-849, 853; *Rivera v. Rhode Island*, 402 F.3d 27, 35-36 (1st Cir. 2005); *Butera*, 235 F.3d at 651-652; *Davis*, 143 F.3d at 1024; and *McClendon*, 305 F.3d at 325-326. Thus, to say, as does *Cornelius*, that there is a duty to protect when the state creates the harm is not to say, as *White* accuses it of saying, that the plaintiff no longer has to satisfy the shock the conscience standard. In other words, *Lewis* and *Collins* have nothing to say about *Cornelius*' discussion of the duty. That duty makes it more likely the conduct will violate *Lewis*' shock standard, but it still must be satisfied. *Cornelius* simply held that the officials had a duty and left the rest of the analysis for the district court.

Hence, the Eleventh Circuit decided an important federal question in a way that conflicts with relevant decisions of this Court. See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) and *Collins v. City of Harker Heights*, 503 U.S. 115 (1992). In addition, the Eleventh Circuit's decision is in conflict with the other circuit courts and the Alabama Supreme Court because they continue to hold that the "special relationship" and "state created danger" doctrines are valid 42 U.S.C. § 1983 causes of action. See *Wright v. Bailey*, 611 So.2d 300, 304-306 (Ala. 1992) (citing *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) and other related cases); *C.B. v. Bobo*, 659 So.2d 98 (Ala. 1995); *Ex parte Alabama Department of Youth Services*, 880 So.2d 393 (Ala. 2003) (substantive due process right to bodily integrity); *Butera v. District of Columbia*, 235 F.3d 637, 648-651 & fn. 10-11 (D.C. Cir. 2001); *Frances-Colon v. Ramirez*, 107 F.3d 62, 64 (1st Cir. 1997); *Dwares v. City of New York*, 985 F.2d 94, 98-99 (2d Cir. 1993); *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996); *Pinder v. Johnson*, 54 F.3d 1169, 1175-1177 (4th Cir. 1995) (en banc); *McClendon v.*

City of Columbia, 305 F.3d 314, 324 (5th Cir. 2002); *Johnson v. Dallas Indep. Sch. Distr.*, 38 F.3d 198, 200-201 (5th Cir. 1994); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-1067 (6th Cir. 1998); *Jones v. Union County*, 296 F.3d 417, 428 (6th Cir. 2002); *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc); *Wood v. Ostrander*, 879 F.2d 583, 589-590 (9th Cir. 1989); *Uhlrig v. Harder*, 64 F.3d 567, 572 & n. 7 (10th Cir. 1995); and *Ruiz v. McDonnell*, 299 F.3d 1173, 1182 (10th Cir. 2002).

CONCLUSION

The petition for certiorari should be granted.

RESPECTFULLY SUBMITTED, this the 23rd day of August 2006.

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THE CITY OF ATHENS, ALABAMA,
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On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

APPENDIX

176 Fed.Appx. 974

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-12954
Non-Argument Calendar

D.C. Docket No. 04-20039-CV-UUB

SYLVIA VAUGHN,
as Administratrix of the
Estate of Anthony Ryan McLemore,

Plaintiff-Appellant,

versus

ATHENS, CITY OF, a municipal Corporation,
WAYNE HARPER, individually and as Chief of Police
of the City of Athens,
TRACY HARRISON,
TREVOR HARRIS,
individually and as police officers of the City of Athens,
JOHN DAVID BROWN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(April 20, 2006)

Before EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

Plaintiff-Appellant Sylvia Vaughn, as Administratrix of the Estate of Anthony Ryan McLemore, appeals the district court's orders dismissing this action, which alleged violations of 42 U.S.C. § 1983 and Alabama state law, against the City of Athens, Alabama, City of Athens Chief of Police Wayne Harper, and City of Athens Police Officers Tracy Harrison and Trevor Harris, arising out of the murder of McLemore by a drug dealer. No reversible error has been shown; we affirm.

According to the complaint, on 18 August 2002, Harris and Harrison arrested McLemore on felony drug possession charges and placed him in the Athens City jail. McLemore was on probation when arrested, and the arrest violated the terms of his probation. McLemore's parole officer, Bruce Graham, was notified of the arrest and placed a hold on McLemore, "meaning he should not be released from jail because of the terms of parole."

Harris and Harrison "worked out an agreement" with McLemore: he agreed to "set up" a drug dealer, John David Brown, in exchange for "leniency or not being charged." McLemore had assisted the Athens Police Department before on drug cases "in exchange for consideration." With Harris and Harrison's approval, McLemore was released from jail on his own recognizance without having to post bond. Graham did not give the Athens Police Department permission to release McLemore. Harris and Harrison sent McLemore to set up a buy from Brown. Harris and Harrison had been warned that Brown would kill McLemore "for trying to set him up for criminal prosecution." The officers ignored the warnings and sent McLemore with no arrangements for his protection. On 20

August 2002, Brown killed McLemore "for trying to set him up."

Plaintiff stated that McLemore would be alive if Defendants "had heeded the warnings and never released him" and "had followed proper protocol." The complaint also alleged that McLemore's death was caused by the failure of the City and Chief Harper to train and to supervise properly the jail staff and the officers. Plaintiff asserted that, under § 1983, Defendants' deliberate indifference to McLemore's safety caused his death and violated his due process rights. Plaintiff also presented state law claims (1) for wrongful death, based on Defendants' willful, wanton, and malicious behavior, and (2) for the City's and Chief Harper's negligent training and supervision.

We review a district court's grant of a motion to dismiss *de novo*; we take as true the facts as alleged in the complaint. *Owens v. Samkle Auto., Inc.*, 425 F.3d 1318, 1320 (11th Cir. 2005). A motion to dismiss under Fed.R.Civ.P. 12(b)(6) should be granted only if it appears beyond doubt that the plaintiffs can prove no set of facts in support of their allegations which would entitle them to relief. *White v. Lemacks*, 183 F.3d 1253, 1255 (11th Cir. 1999).

Plaintiff argues first that Harris and Harrison deprived McLemore of his due process rights. Plaintiff contends that Harris and Harrison owed a duty to protect McLemore because he had a substantive due process right to bodily integrity.[1] Plaintiff asserts that the officers

[1] Plaintiff also contends that Defendants owed a duty to protect McLemore because of his "special relationship" with Defendants – he

(Continued on following page)

breached their duty to McLemore when they were deliberately indifferent to a risk of serious harm to him. And Plaintiff maintains that this deliberate indifference shocks the conscience: the officers had the time and means to prevent the harm to McLemore, but chose to do nothing.

Plaintiff has not alleged a deprivation of McLemore's due process rights. We are guided by the proposition that generally "a person does not have a constitutional right under the Fourteenth Amendment to be protected from the criminal acts of third parties." *Mitchell v. Duval County Sch. Bd.*, 107 F.3d 837, 838 (11th Cir. 1997). And the government's automatic duty to protect persons from harm by third parties is limited to custodial relationships: "those which arise from the incarceration of prisoners or other forms of involuntary confinement through which the government deprives individuals of their liberty and thus of their ability to take care of themselves." *White*, 183 F.3d at 1257. McLemore was not so confined when Brown murdered him: the complaint alleges that McLemore "was released from jail on his own recognizance" without having to post bond. Thus, the conduct of Defendants "will rise to the level of a substantive due process violation only if the

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effectively was in custody when murdered – and because Defendants created the danger to which McLemore was exposed. But this Court has written that the "special relationship" and "state created danger" doctrines no longer are valid. *See Waddell v. Hendry County Sheriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003); *White*, 183 F.3d at 1257-59. And Plaintiff's contention that Harrison and Harris owed McLemore a federal due process duty to protect based on state tort law and on Ala. Code § 14-6-105, which provides that jails have a night watchman, is not material. *See Knight v. Jacobson*, 300 F.3d 1272, 1276 (11th Cir. 2002) ("While the violation of state law may (or may not) give rise to a state tort claim, it is not enough by itself to support a claim under section 1983").

act can be characterized as arbitrary or conscience shocking in a constitutional sense." *Waddell v. Hendry County Sherriff's Office*, 329 F.3d 1300, 1305 (11th Cir. 2003).

We have cautioned that, in a non-custodial setting, "a substantive due process violation would, *at the very least*, require a showing of deliberate indifference to an extremely great risk of serious injury to someone in [McLemore's] position." *Id.* at 1306 (emphasis added). And we do not determine if Defendant's conduct was egregious "in the glow of hindsight; decisions made by a government actor *must be egregious – that is, shock the conscience – at the time the government actor made the decision.*" *Id.* at 1305 (emphasis in original).

Taking the facts in the complaint as true, the acts of Harris and Harrison are not "conscience shocking." We are aware that Harris and Harrison allegedly did not follow state law and the instructions of McLemore's parole officer in releasing him from jail without posting bond. But even if the officers' acts violated state law, Plaintiff has presented no case law that McLemore had a substantive due process right to be held in jail until his parole officer said he could be released. *See id.* at 1306-07.

That Harris and Harrison ignored the warning that Brown would kill McLemore for trying to "set him up," and that the officers did not do enough to protect McLemore when he was sent to make the drug buy, do not rise to the level of "conscience shocking." *See Nix v. Franklin County Sch. Dist.*, 311 F.3d 1373, 1376 (11th Cir. 2002) (determining that teacher's use of live wire in class demonstration, where teacher knew that electricity running through wire was enough to cause death and that students might touch wire, did not shock the conscience to set forth a substantive

due process claim). The complaint alleges that McLemore had been a drug informant for the Athens Police Department in the past: Plaintiff does not argue that McLemore was unaware of the risks of being an informant. *See United States v. Simon,* 767 F.2d 524, 527 (8th Cir. 1985) (noting the dangers inherent in narcotics dealing, including the prevalence of firearms). The complaint also alleges that McLemore had reached an agreement with the officers to perform as a drug informant with the hope that he would receive a benefit from this arrangement. Thus, the complaint does not allege that McLemore was forced to function as an informant. In other words, McLemore decided to become a drug informant, he was experienced in acting as such, and Plaintiff does not allege that the officers acted maliciously. The acts of Harris and Harrison – releasing McLemore from jail and using him as an informant – were not so egregious as to establish a substantive due process violation.

Because we determine that Harris and Harrison's conduct did not cause McLemore to suffer a constitutional deprivation, we need not decide whether the officers were entitled to qualified immunity.[2] *See Saucier v. Katz,* 121 S.Ct. 2151, 2156 (2001) (stating that "threshold inquiry" in qualified immunity analysis is whether Plaintiff's allegations, if true, establish constitutional violation, and that, if no constitutional violation exists, one need not inquire further into qualified immunity). Because the complaint failed to state a constitutional deprivation, neither the City nor Harper can be liable under § 1983 based on (1) an

[2] After determining that the officers did not violate McLemore's constitutional rights, the district court concluded that the officers and Chief Harper were entitled to qualified immunity.

alleged policy of allowing officers to violate state law by illegally removing detainees and making non-enforceable agreements with suspects, or (2) a failure to train and supervise properly the jail staff and officers. *See Rooney v. Watson,* 101 F.3d 1378, 1381-82 (11th Cir. 1996) (where plaintiff suffers no constitutional deprivation, courts need not consider policy or custom of municipality). In sum, we affirm the district court's dismissal of Plaintiff's § 1983 claims.[3]

Plaintiff next argues that Defendants are not entitled to discretionary-function immunity on the state law wrongful death and negligent training and supervision claims.[4] Alabama law provides immunity from tort liability for police officers performing discretionary functions within the scope of their law enforcement duties. *See* Ala. Code § 6-5-338(a). In analyzing discretionary-function immunity claims, Defendants first must prove that they "were engaged in the performance of discretionary functions at the time the alleged torts occurred." *Sheth v. Webster,* 145 F.3d 1231, 1238 (11th Cir. 1998). Plaintiff then must show that Defendants "acted in bad faith, with

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[3] We also reject Plaintiff's assertion that he stated a § 1983 claim against Brown. Plaintiff pled no facts showing that Brown, a drug dealer whom the officers wished to set up, was acting under color of state law when he killed McLemore. *See Harvey v. Harvey,* 949 F.2d 1127, 1130 (11th Cir. 1992) (stating that successful § 1983 action requires showing that conduct complained of was committed by a person acting under color of state law).

[4] Plaintiff does not appeal the dismissal of her claim based on Ala. Code § 14-6-105, which provides that jails have a night watchman. Instead, in connection with her § 1983 claims, she cites § 14-6-105 to show that Defendants had a state law duty to protect McLemore because he had been detained at the jail. We do not address a substantive claim based on § 14-6-105.

malice or willfulness in order to deny them immunity." *Id.* at 1239.

Thus, we first must determine whether Defendants were engaged in the performance of discretionary functions at the time the wrongful death tort occurred. Discretionary acts are acts about which "no hard and fast rule" exists "on the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances." *Sheth,* 145 F.3d at 1239 (citation omitted).

Plaintiff argues that the Harris and Harrison acted outside the scope of their authority under Alabama law because (1) only a judicial officer, not police officers, may release an arrestee on his own recognizance, also known as "judicial public bail," (2) McLemore was on probation at the time of his arrest and not eligible for judicial public bail, (3) McLemore's parole officer had placed a hold on him for violating parole, and (4) only prosecutors, not law enforcement, have the authority to enter into agreements with arrestees. Plaintiff may be correct that the officers violated state law in releasing McLemore on judicial public bail and that the officers' alleged offer of leniency would not have been enforceable. Nevertheless, these acts occurred before and are remote from the wrongful death tort. We do not see how these acts caused McLemore's later shooting death when he was functioning as a drug informant.

So, the proper inquiry is whether the officers' use of McLemore as an informant, as part of an attempt to "set up" a drug buy from Brown, was within the scope of the officers' discretionary functions. We answer affirmatively. *See Ex Parte Cranman,* 792 So. 2d 392, 405 (Ala. 2000)

(noting that state agent is immune from liability when exercising judgment in enforcing state criminal laws, including "law-enforcement officers' arresting or attempting to arrest persons"). And Plaintiff does not contend that the use of McLemore as a drug informant was outside the scope of the officers' discretionary functions.

About the second element of the discretionary-function immunity analysis, Plaintiff did not allege that the officers intended for Brown to murder McLemore. And the complaint reflects that McLemore decided to function as a drug informant to obtain a benefit: the complaint does not allege that the officers forced McLemore to act as such. Plaintiff alleged no facts suggesting that the officers' use of him as a drug informant was willful, malicious, or in bad faith. *See Sheth,* 145 F.3d at 1239. Harris and Harrison are entitled to discretionary-function immunity.

The district court also correctly dismissed Plaintiff's state law claim against Chief Harper based on an alleged failure to train and supervise the officers and jail staff. Training and supervising employees is a discretionary function. *See Howard v. City of Atmore,* 887 So. 2d 201, 209-10 (Ala. 2003). And Plaintiff alleged no facts suggesting that Chief Harper acted willfully, maliciously, or in bad faith.

Because the officers and Chief Harper are entitled to discretionary function immunity based on their acts, the City also is entitled to immunity. *See* Ala. Code § 6-5-338(b); *Ex Parte City of Gadsden,* 781 So. 2d 936, 940 (Ala. 2000). In sum, the district court correctly dismissed Plaintiff's wrongful death claims against the officers and the City based on discretionary-function immunity.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

SYLVIA VAUGHN, as Administratrix, of the estate of ANTHONY RYAN McLEMORE	]	
PLAINTIFF,	]	
v.	]	Case No. CV-03-VEH-3052-S
THE CITY OF ATHENS, et. al.,	]	
DEFENDANTS.	]	

OPINION

(Filed May 19, 2005)

This Court has before it the Defendant Wayne Harper's Motion to Dismiss. (Doc. 13)

I. Procedural History

Plaintiff Sylvia Vaughn, as the Administratrix for the estate of Anthony Ryan McLemore, the deceased, commenced this action on November 13, 2003, by filing a complaint in this Court alleging violations of 42 U.S.C. § 1983 (Count I); ALA. CODE § 14-6-105 (1975) (Count II); ALA. CODE § 6-5-410 (1975) (Count III); and asserting that while acting as an agent of the other co-defendants, John Brown assaulted and battered Anthony Ryan McLemore (Count IV). The Plaintiff filed a complaint against the Defendants, City of Athens, Alabama Chief of Police Wayne Harper, Officer Tracy Harrison, Officer Trevor Harris, and John Brown. On December 3, 2003, the

Defendants contemporaneously filed separate motions to dismiss.[1] Defendant Harper filed a motion to dismiss on the following grounds: (1) failure to state a claim upon which relief may be granted, (2) Plaintiff's official capacity claims against Defendants are redundant and superfluous, (3) Defendants have qualified immunity from the Plaintiff's claims in this action under 42 U.S.C. § 1983, (4) Defendant has both statutory discretionary function immunity under ALA. CODE § 6-5-338(a) (1975) and common law discretionary function immunity under § 875D of the Restatement 2d of Torts from the Plaintiff's state law claims, (5) Plaintiff's claims premised on an alleged violation of ALA. CODE § 14-6-105 (1975) did not survive the death of Plaintiff's decedent and are merged into the Plaintiff's wrongful death claim under ALA. CODE §6-5-410 (1975), (6) Plaintiff has no maintainable claim under ALA. CODE § 14-6-105 (1975), and (7) Defendant Harper has failed to meet the heightened pleading standard applicable to claims brought under 42 U.S.C. § 1983 where the defense of qualified immunity has been asserted by a defendant.

II. Standard of Review

A. Motion To Dismiss

"When considering a motion to dismiss for failure to state a claim, a court must accept the allegations in the complaint as true, construing them in the light most

[1] The motions to dismiss filed by the other four remaining Defendants (City of Athens, Alabama, Officer Tracy Harrison, Officer Trevor Harris, and John Brown) are the subject of separate pending motions to dismiss filed contemporaneously with the motion to dismiss regarding Defendant Harper.

favorable to the plaintiff." *Murphy v. FDIC,* 208 F.3d 959, 962 (11th Cir. 2003) (quoting *Kirby v. Siegelman,* 195 F. 3d 1285, 1289 (11th Cir. 1999)). Unless it appears beyond doubt that the Plaintiffs could prove no set of facts entitling them to relief, neither the complaint nor any count therein may be dismissed. *Conley v. Gibson,* 335 U.S. 41, 45-36 (1957); *Harris v. Proctor & Gamble Cellulose,* 73 F. 3d 321, 324 (11th Cir. 1996).

III. Allegations of Complaints[2]

The complaint alleges that "on August 18, 2002, Officer Trevor Harris arrested Anthony McLemore, and placed him in the Athens City Jail on the charges of Unlawful Possession of Controlled Substances, a felony." (Complaint, ¶ 11.) According to the complaint, "under Alabama law, a person cannot have a signature bond for a felony, and he must go through the county jail." (Complaint, ¶ 12.) The complaint alleges that "Anthony McLemore was already on probation at the time of his arrest." (Complaint, ¶ 13.) Plaintiff alleges that "the arrest violated the terms of Anthony McLemore's probation." (Complaint, ¶ 14.) Plaintiff also alleges that "Anthony McLemore's parole officer, Bruce Graham, was notified of Anthony McLemore's arrest." (Complaint, ¶ 15.) The complaint alleges that, "Bruce Graham placed a hold on McLemore, meaning he should not be released from the jail because of the terms of his parole." (Complaint, ¶ 16.) The complaint also alleges that, "the Defendants, Trevor

[2] The Court understands that the allegations set forth in the Complaint are strictly those of the Plaintiff. Given the standard of review, the Court must accept such allegations as true for the purpose of granting or denying a motion to dismiss.

Harris and Tracy Harrison of the Athens Police Department, worked out an agreement with Anthony McLemore where he agreed to cooperate by setting up a drug dealer, John David Brown." (Complaint, ¶ 17.) According to the complaint, "Anthony McLemore agreed to cooperate in exchange for leniency or not being charged." (Complaint, ¶ 18.) The Plaintiff alleges that, "Anthony McLemore has helped the Athens Police Department in the past on some drug cases in exchange for consideration." (Complaint, ¶ 19.) According to the complaint, "Anthony McLemore was released from the jail on his own recognizance; he did not have to post any bond." (Complaint, ¶ 20.) The complaint alleges that, "Harris and Harrison approved of McLemore's release." (Complaint, ¶ 21.) According to the complaint, "Bruce Graham never gave the Athens Police Department permission to release Anthony McLemore." (Complaint, ¶ 22.) Plaintiff alleges that, "Harris and Harrison sent Anthony McLemore to set up a buy from John Brown." (Complaint, ¶ 23.) According to the complaint, "Standard protocol is to search the informant and then wire him. The informant is followed within a few blocks of the deal and the transaction is listened to in case something goes bad." (Complaint, ¶ 24.)

Plaintiff contends in her complaint that before McLemore was sent to "set up" the buy from Brown, the officers were warned that Brown would attempt to kill McLemore "for trying to set him up for criminal prosecution." (Complaint, ¶ 25.) The complaint alleges that the officers "ignored the warnings and sent Anthony anyway." (Complaint, ¶ 26.) The complaint alleges that no "arrangements were made to protect Anthony." (Complaint, ¶ 27.) Plaintiff alleges that McLemore was killed by Brown

"on August 20, 2002, for trying to set him up." (Complaint, ¶ 28.)

According to the complaint, "Anthony McLemore would be alive today if the defendants had heeded the warnings and never released him." (Complaint, ¶ 29.) Plaintiff further alleges that McLemore "would also be alive today if the defendants had followed proper protocol." (Complaint, ¶ 30.) The complaint alleges that "Defendants Athens and Harper negligently, wantonly, and with deliberate, indifference, supervised and improperly trained the jail staff and the officers." (Complaint, ¶ 32.) The Plaintiff further alleges that "Defendants were well aware of the lack of safety and supervision, which led to Anthony McLemore's death." (Complaint, ¶ 33.)

IV. Applicable Substantive Law and Analysis

A. Defendant Harper Official Capacity Claim

The Plaintiff sues the Defendant Harper in his official capacity. The Plaintiff concedes that these claims must be dismissed because the City of Athens, Alabama is a separately named defendant in this action. Therefore, the Plaintiff's official capacity claims against Defendant Harper are redundant and should be dismissed. "Official capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent . . . [A]n official-capacity suit is, in all respects other than name, to be treated as the suit against the entity." *Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985) (internal quotation marks omitted). Accordingly, Defendant Harper's motion to dismiss the Plaintiff's claims against Defendant Harper in his official capacity is due to

be GRANTED. The Plaintiff's claims against Defendant Harper in his official capacity are **DISMISSED**.

B. Qualified Immunity 42 U.S.C. § 1983 As To Defendant Harper

Defendant Chief Harper has moved the Court to dismiss the Plaintiff's claims alleged against him under 42 U.S.C. § 1983 for failure to state a maintainable claim and has also asserted the defense of qualified immunity. The Plaintiff asserts that under the factual allegations in this case, the claims against Defendant Harper should not be dismissed because he "negligently, wantonly, and with deliberate indifference, supervised and improperly trained the [Athens City] jail staff and the police officers" under his command. (Complaint, ¶ 32).

The threshold inquiry a court must undertake in a qualified immunity analysis is whether the allegations, if true, establish a constitutional violation. *Hope v. Pelzer,* 536 U.S. 730, 736 (2002). If a state official deprives an individual of a constitutional right, the state official will only be liable if his actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 739. The state of the law at the time of deprivation must have been "clearly established" before a government actor can be said to have "fair warning" that the alleged conduct was unconstitutional.

The Supreme Court has developed an objective-reasonableness test for evaluating claims of qualified immunity in section 1983 cases. Under this test, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory

or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). The Eleventh Circuit has observed that because "qualified immunity shields government actors in all but exceptional cases, courts should think long and hard before stripping defendants of immunity." *Lassister v. Alabama A&M Univ.,* 28 F.3d 1146, 1149 (11th Cir. 1994).

The Eleventh Circuit employs a two-pronged analysis for determining whether the qualified immunity defense, as defined in *Harlow,* protects a government actor from individual section 1983 liability. To invoke the qualified immunity defense, the police officer has the initial burden of proving that he was acting within the scope of his discretionary authority at the time the alleged wrongful act occurred. *Stough v. Gallagher,* 967 F.2d 1523, 1526 (11th Cir. 1992); *Rich v. Dollar,* 841 F.2d 1558, 1562 (11th Cir. 1988). Under the first prong, all that is required is for the police officer to show "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Rich*, 841 F.2d at 1564. In determining whether this test is met, there is no analysis of whether the police officer actually acted lawfully. *See Sims v. Metropolitan Dade County,* 972 F.2d 1230, 1236 (11th Cir. 1992). Rather, the issue is whether "the act complained of, if done for a proper purpose, would be within, or reasonably related to, the outer perimeter of [the police officer's] discretionary duties. *Harbert Int'l, Inc. v. James,* 157 F.3d 1271, 1282 (11th Cir. 1998). If the first prong is satisfied, the burden then shifts to the plaintiff to show lack of good faith on the part of the police officer. *Id.* The plaintiff can satisfy this burden only by proving that the police officer's conduct violated "clearly established"

constitutional law or a federal statute. *Id.* In *Vinyard v. Wilson,* 311 F.3d 1340 (11th Cir. 2002), the Eleventh Circuit clarified the requirements of the defense of qualified immunity in the Eleventh Circuit following *Hope v. Pelzer,* 536 U.S. 730 (2002).

In *Hope v. Pelzer,* 536 U.S. 730, 741 (2002), the Supreme Court stated that the "salient question" for purposes of determining whether a violation of clearly established law has occurred is "whether the state of the law [at the time of the challenged conduct] gave [the government actor] fair warning that [his or her] alleged treatment [of the plaintiff] was unconstitutional." The Supreme Court has cautioned, however, that the inquiry into whether a constitutional right is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz,* 533 U.S. 194, 201 (2001). Unless a Plaintiff in a § 1983 case can point to a case that fairly warns the government actor of the unconstitutionality of the challenged conduct, qualified immunity should protect the officer from liability under 42 U.S.C. § 1983. *See Wilson v. Layne,* 526 U.S. 603, 504 (1999) (granting qualified immunity where plaintiff could not point to case law existing at the time of the incident which clearly established the rule of law upon which the plaintiff sought to rely); *See also Vinyard of Wilson,* 311 F.3d 1340, 1351-1353 (11th Cir. 2002) recognizing that, based on the Supreme Court's decision in *Hope* that unless a constitutional provision directly prohibits the challenged conduct, or a case had previously held that the challenged conduct to be unconstitutional under any circumstances, before a government actor may be stripped of qualified immunity, a § 1983 plaintiff must show that case law with "a very high degree of factual particularity"

had previously determined the conduct to be unconstitutional.

Further, the Plaintiff has not satisfied the heightened pleading requirements for § 1983 actions against Defendant Harper. "Under the qualified-immunity defense, the defendants are immune from liability and even from trial if plaintiff's complaint fails to state a violation of 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Oladeinde v. City of Birmingham,* 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied, sub nom, Deutsch v. Oladeinde,* 507 U.S. 987, 113 S.Ct. 1586 (1993). See *Lassiter v. Alabama A&M University,* 28 F.3d 1146, 1149 quoting *Hunter v. Bryant,* 502 U.S. 224, 112 S.CT. 534, 536 (1991). ("We repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.") In *GJR Investments, Inc. v. County of Escambia,* 132 F.3d 1359 (11th Cir. 1998), the Eleventh Circuit made it clear that a heightened pleadings standard exists in this Circuit with regard to individual capacity claims in which qualified immunity is at issue. In *GJR Investments,* the Court explained that "this Circuit, along with others, has heightened the application of Rule 8 with respect to Section 1983 cases in an effort to weed out non-meritorious claims, requiring that a Section 1983 plaintiff allege with some specificity the facts which make out its claim." *GJR Investments,* 132 F.3d at 1367. The Eleventh Circuit discussed the heightened pleading requirement in *Gonzalez v. Reno,* 325 F.3d 1228, 1235 (11th Cir. 2003) and held that "in examining the factual allegations in the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity."

Plaintiff's allegation against Defendant Harper is a conclusory and vague allegation that Defendant Harper failed to properly train, supervise or monitor city police officers and jailers under his command. (See Plaintiff's Brief in Opposition at p. 39). The Plaintiff's allegation lacks the requisite level of specificity required under the Eleventh Circuit's heightened pleading standard to constitute a maintainable claim against Defendant Harper in this action. Based on the foregoing reasons, Defendant Harper is entitled to qualified immunity and his motion to dismiss the Plaintiff's claims against Defendant Harper in his individual capacity is due to be **GRANTED**.

C. Plaintiff's State Law Tort Claims Against Chief Harper

Plaintiff's state law claims against Defendant Harper in this action are premised on an alleged failure to train or supervise the defendant police officers alleged to have been involved in the matters at issue in this case. Under ALA. CODE § 6-5-338(a) (1975), law enforcement officers have statutory discretionary function immunity from state law tort claims arising out of the performance of a discretionary function within the line and scope of their law enforcement duties. In addition to the statutory discretionary function immunity available to law enforcement officers under §6-5-338(a), there is also a similar common-law discretionary function immunity to which public officials are also entitled. This common law doctrine of discretionary function immunity provides that "public officials, including municipal employees, have substantive immunity from tort liability for actions taken while they are acting within the line and scope of their official duties and are engaged in the exercise of a discretionary function."

Williams v. Crook, 741 So.2d 1074, 1076 (Ala. 1999). See also *Roden v. Wright,* 646 So.2d 605, 610 (Ala. 1994). The source of the common law doctrine of discretionary function immunity is § 895D of the *Restatement 2d of Torts* which governs immunity from tort liability of public officers. *Grant v. Davis,* 537 So.2d 7 (Ala. 1988). Because the doctrine was originally formulated to be applicable to claims against state officials engaged in the performance of their official duties, there was initially some confusion as to whether the doctrine also had applicability to county and municipal officers and employees. *Taylor v. Adams,* 221 F.3d 1254, 1260-1261 (11th Cir. 2000). However, federal and state courts in Alabama both now recognize the doctrine to be firmly applicable to claims against both city and county officers and employees. *Taylor* at *id.*; *Roden,* 646 So. 2d at 609-11 (Doctrine applicable to county commissioner); *Ex Parte City of Birmingham,* 624 So.2d 1018, 1021 (Ala. 1993) (Doctrine applicable to various city officials); *Crown v. City of Athens,* 733 So.2d 447, 449, 451 (Ala. Civ. App. 1999) (Doctrine applicable to city official); *Marnon v. City of Dothan,* 677 So.2d 755, 761 (Ala. Civ. App. 1995) (Doctrine applicable to city commissioners). Common law discretionary function immunity is specifically applicable to police officers engaged in the performance of their duties. See *Crouch v. Whatley,* 900 F. Supp. 1567, 1571-73 (M.D. Ala. 1995) (Doctrine applicable to municipal police officer).

A public officer is entitled to both common law discretionary function immunity under § 895D and to statutory discretionary function immunity under §6-5-338(a), "unless the officer's conduct is so egregious as to amount to willful and malicious conduct or conduct engaged in [sic] in bad f[illegible]h." *Couch v. City of Sheffield,* 1708 So.2d 144, 153

(Ala. 1998); *Ex parte Davis,* 721 So.2d 685, 689 (Ala. 1998). The procedural framework for analyzing both statutory and common law discretionary function immunity claims is a two-pronged inquiry. *Sheth v. Webster,* 145 F.3d 1231, 1238-1239 (11th Cir. 1998); *Ex parte Davis* at 689. The first prong involves proof by the defendant public officer that the officer was "engaged in the performance of discretionary functions at the time the alleged torts occurred." *Sheth,* 145 F.3d at 1238; *Ex parte Davis* at 689. If the actions complained of were discretionary acts, "the burden shifts to the plaintiff to demonstrate that the defendants acted in bad faith, with malice or willfulness in order to deny them immunity." *Sheth,* 145 F.3d at 1239; *Ex parte Davis* at 689.

"Discretionary functions [are] 'those acts as to which there is no hard and fast rule as to the course of conduct that one must or must not take and those acts requiring exercise in judgment and choice and involving what is just and proper under the circumstances.'" *Ex parte Duvall,* 782 So.2d 244, 248 (Ala. 2000) (quoting *Ex parte City of Montgomery,* 758 So.2d 565, 569 (Ala. 1999)). Alabama and federal courts have recognized that the training or supervision of employees, including police officers, constitutes a discretionary function. *See, e.g., L.S.B. v. Howard,* 659 So.2d 43, 44 (Ala. 1995) ("The exercise of supervisory functions is usually discretionary, because it requires 'constant decision making and judgment' by the person in the supervisory role . . . Howard's administration and direction of her teachers and teacher's aides necessarily require her to use her best judgment in making those decisions affecting her school; this is a discretionary function."); *Nance v. Matthews,* 622 So.2d 297, 301-302 (Ala. 1993); *Phillips v. Thomas,* 555 So.2d 81, 85 (Ala.

1989); *Marnon v. City of Dothan*, 6117 So.2d 755, 761 (Ala. Civ. App. 1995). *See also Ross v. State of Alabama,* 15 F.Supp. 2d 1173, 1196 (M.D. Ala. 1988) ("[T]he court finds that Defendant Parsons' actions in supervising Defendant Bowman were well within her discretionary authority. Certainly it is well within the scope of authority of the County director of the Houston County DHR to determine the appropriate training, supervision, and discipline for a DHR a social worker within her County. Accordingly, the court finds that Defendants Bowman and Parsons are entitled to substantive immunity on the state tort claims alleged in Plaintiffs' Amended Complaint."); *Williams v. Goldsmith,* 905 F.Supp. 996, 1003 (M.D. Ala. 1995) ("Count VI of the complaint alleges that Defendant Paul [a County Sheriff] 'negligently, recklessly and/or wantonly failed to supervise, instruct or train Defendant Goldsmith in his duties as a Deputy Sheriff'. . . . Sovereign immunity includes a qualified immunity available to state officers acting within the general scope of their authority who perform discretionary functions. . . . State officials responsible for training other employees are entitled to qualified (or substantive) immunity from suits arising out of training activities. . . . Defendant Paul, as Sheriff of Coffee County, possessed the authority to train his deputies, and the exercise of this authority was a discretionary function, entitling him to sovereign immunity from this claim. Therefore, Court [sic] VI, the claim against Sheriff Paul for failure to train deputy Goldsmith, will be dismissed.") (citation omitted).

The training or supervision of the City of Athens police officers by Defendant Harper constitute a discretionary function. Accordingly, Defendant Harper is entitled to statutory and common-law discretionary function

immunity as to the plaintiff's state tort law claims against him.

D. Plaintiff's Claims Under § 14-6-105, Code of Alabama (1975)

Plaintiff alleges in her complaint a claim under ALA. CODE §14-6-105 (1975) against Defendant Harper. Section 14-6-105 is an Alabama state statute which provides that jails in which prisoners are confined are required to have a "deputy, watchman or attendant, whose duty it shall be to watch the jail or prison at night for the prevention of escapes and fire and to aid in case of sickness among the prisoners, and who shall have access to the jail or prison and to the prisoners." Plaintiff contends that Anthony Ryan McLemore "comes within the purview and protection of the above ordinance by virtue of the fact that he was an informant for the City of Athens Police Department, which was overseen by the defendants." (Complaint, ¶ 40.) Plaintiff alleges that the defendants violated Section 14-6-105 by failing to provide the supervision mandated under §14-6-105, constituting negligence per se.

Plaintiff has no maintainable claim under § 14-6-105 for two reasons. First, any such claim did not survive the death of Plaintiff's decedent and Plaintiff's sole claim arising out of the death of Anthony McLemore is a wrongful death claim under ALA. CODE §6-5-410 (1975). Second, such statute does not provide a private right of action against any of the defendants in this action in any event.

It is not clear as to whether Plaintiff intends for this claim to be actionable under §1983 or contends for this claim to give rise to some state law cause of action. Nevertheless, any such supported claim did not survive the

death of Anthony Ryan McLemore in any event. Since §1983 does not provide for the survival of claims, federal courts turn under 42 U.S.C. §1988 to state law to fill this gap. Section 1988 directs federal courts to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] state," as long as these are "not inconsistent with the Constitution and laws of the United States" when federal law is deficient in provisions necessary to furnish suitable remedies. In *Brazier v. Cherry,* 293 F.2d 401 (5th Cir. 1961), the then Fifth Circuit interpreted Section 1988 and held that, in the absence of a federal survivorship law, courts should look to state survivorship law.

The Alabama Supreme Court has held that, under ALA. CODE §6-5-462 (1975), "an unfiled tort claim does not survive the death of the person with the claim." *McDuffie v. Hopper, et al.,* 982 F.Supp. 817 (M.D. Ala. 1997) (quoting *Malcolm v. King,* 686 So.2d 231 (Ala. 1996)). However, the statute has been held not to abate actions for wrongful death. *Mattison v. Kirk,* 497 So.2d 120 (Ala. 1986), overruled on other grounds, *King v. National Spa & Pool Inst., Inc.,* 607 So.2d 1241 (Ala. 1992). The Plaintiff has not presented any facts that a claim under §14-6-105 was filed prior to the death of Anthony Ryan McLemore. Therefore, this Court holds that Plaintiff's claims under §14-6-105, which were not filed at the time of Anthony Ryan McLemore's death, abated upon his death. However, Plaintiff's sole claim arising out of McLemore's death in this action, the wrongful death claim under ALA. CODE §6-5-410 (1975), does survive.

Further, Plaintiff has no maintainable claim under §14-6-105 because there is no authority providing for a private right of action for any alleged violation of that code

provision. Absent any such authority, no such cause of action exists. See *Roberts v. City of Geneva,* 114 F.Supp. 2d 1199, 1215 N.D. Ala. 2000) (quoting *Leonard v. Enterprise Rent A Car Co.,* 38 F.Supp. 2d 982, 984 (M.D. Ala. 1999) ("A federal court may not read a private cause of action into a state statute absent 'clear and specific evidence' that the legislature intended to authorize such cause of action.")) There is no language contained in §14-6-105 which indicates that a private right of action for money damages for violation of that code provision is authorized or available. In addition, Plaintiff does not cite any authority creating a private cause of action for violations of ALA. CODE § 14-6-105 (1975). Accordingly, Defendant Harper's motion to dismiss as to Plaintiff's alleged claims under §14-6-105 is due to be **GRANTED**.

E. Wrongful Death Claim

The Plaintiff asserts a wrongful death claim under ALA. CODE §6-5-410 (1975). As noted above, the Alabama Supreme Court has held that, under ALA. CODE §6-5-462 (1975), "an unfiled tort claim does not survive the death of the person with the claim." *McDuffie v. Hopper, et al.,* 982 F.Supp. 817 (M.D. Ala. 1997) (quoting *Malcolm v. King,* 686 So.2d 231 (Ala. 1996)). However, the statute has been held not to abate actions for wrongful death. *Mattison v. Kirk,* 497 So.2d 120 (Ala. 1986), overruled on other grounds, *King v. National Spa & Pool Inst., Inc.,* 607 So.2d 1241 (Ala. 1992). Therefore, Plaintiff's sole tort claim arising out of McLemore's death in this action is a wrongful death claim under ALA. CODE §6-5-410 (1975). Although Plaintiff's wrongful death claim under ALA. CODE §6-5-410 (1975) does survive McLemore's death, Defendant Harper is entitled to immunity under both statutory

discretionary function immunity (ALA. CODE § 6-5-338(a) (1975)) and common law discretionary function immunity (§875D of the Restatement 2d of Torts) as discussed in Section C.

Accordingly, Defendant Harper's motion to dismiss as to Plaintiff's wrongful death claim under §6-5-410 is due to be **GRANTED**.

F. Plaintiff's Claims Under Principles of Agency Law

In the complaint, Plaintiff asserts that "John Brown was the agent of the Co-Defendants and/or they ratified his conduct" (Complaint, ¶ 49). It is not clear from Plaintiff's complaint and brief whether Plaintiff is asserting that John Brown was an agent of Defendant Harper. To the extent that Plaintiff asserts that Brown was the agent of Defendant Harper, the Court finds that Brown was not the agent of Defendant Harper under principles of agency law.

Under Alabama law, "the test for agency is whether the alleged principal has retained a right of control over the actions of the alleged agent. See *Ex parte Wild West Social Club, Inc.*, 806 So.2d 1235, 1241 (Ala. 2001). See also *Gist v. Vulcan Oil Co.*, 640 So. 2d 940, 942 (Ala. 1994); *Butler v. Aetna Fin. Co.*, 587 So. 2d 308, 310 (Ala. 1991) ("It is axiomatic that for an agency relationship to exist, there must be a right of control by the principal over the agent.") Plaintiff's allegations do not assert and contradict that the Defendant had a right to control the actions of John Brown, a drug dealer. In fact, the Plaintiff alleges in the complaint that Officers Harrison and Harris, officers supervised by Defendant Harper, utilized the decedent in

order to "set up" Brown. (Complaint, ¶ 17, 23.) Plaintiff has not pled a set of facts to maintain a claim as a matter of law that Defendant Harper exercised or controlled the behavior of Brown, the alleged agent.

Further, the allegation that the Defendant ratified Brown's conduct is also not maintainable. The doctrine of ratification imposes liability on a principal for an act committed by the principal's agent even when the act was beyond the scope of the agent's authority, if the principal takes certain steps to ratify the act. See *CIT Financial Services, Inc. v. Bowler,* 537 So.2d 4, 5 (Ala. 1988) ("A ratification occurs then a principal retains the benefits resulting from his agent's unauthorized acts with knowledge of the material facts surrounding the transaction." See also *Tuskegee Institute v. May Refrigeration Co.,* 344 So.2d 156, 158 (Ala. 1997); *Gray v. Great American Reserve Ins. Co.,* 495 So.2d 602, 607 (Ala. 1986). The definition of ratification presupposes that an agency relationship exists between the actor and the one whom the plaintiff seeks to hold liable for the act. Since under no set of facts consistent with those Plaintiff has pled can Plaintiff support a claim that Brown was an agent of the Defendant, the issue of ratification is legally irrelevant. Assuming that ratification is relevant, under no set of facts could Plaintiff establish that the Defendant accepted or retained benefits resulting from the murder of the decedent.

Accordingly, Plaintiff's claims under principles of agency law as to Defendant Harper are due to be **DISMISSED**.

V. Conclusion

For the reasons set forth above, the Court grants the Defendant's motion to dismiss (Doc. 13). This opinion shall be carried out by a separate Order.

DONE and **ORDERED** this 19th day of May, 2005.

/s/ V E Hopkins
VIRGINIA EMERSON HOPKINS
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-12954-CC

SYLVIA VAUGHN,
as Administratrix of the
Estate of Anthony Ryan McLemore,

Plaintiff-Appellant,

versus

ATHENS, CITY OF, a municipal
Corporation, WAYNE HARPER,
individually and as Chief of Police
of the City of Athens,
TRACY HARRISON,
TREVOR HARRIS,
individually and as police officers of
the City of Athens, JOHN DAVID BROWN,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Filed Jul. 12, 2006)

Before: EDMONDSON, Chief Judge, DUBINA and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active Service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ J.L. Edmondson
CHIEF JUDGE